Filed 5/29/09 P. v. Kennedy CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES KENNEDY, Defendant and Appellant.	B207294 (Los Angeles County Super. Ct. No. BA333769)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman J. Shapiro, Judge. Affirmed.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

James Kennedy appeals from the judgment entered following his conviction by jury of custodial possession of a weapon (Pen. Code, § 4502, subd. (a)). The court sentenced appellant to prison for three years. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on November 17, 2007, Los Angeles County Sheriff's Deputies John Hong and Ruben Gonzales were working in the men's central jail. The deputies were about to transport inmates, including appellant, from the jail to another facility. Appellant was carrying his property bag. In an effort to search the bag, Gonzales reached into it.

The county, through the jail, issued Bic disposable razors to most inmates to allow them to shave. Appellant's property bag contained such a razor, wrapped in a paper towel. However, the razor had been altered in that the razor blade's bottom plastic guard was missing with the result that the blade was no longer covered and protected and, instead, was exposed.

Gonzales was wearing a latex glove on his right hand. When Gonzales reached into the bag with his right hand, the razor blade cut through the paper towel and cut his right thumb, resulting in a one-inch laceration.

Hong testified that once the blade guard had been removed from the razor in a jail facility, the razor became a slicing instrument, and an inmate could attack another person by simply walking by with the razor's handle and slashing the person's neck or other location where skin was exposed. This had occurred previously. There was no reason for the blade guard to be missing on the subject razor so that the razor blade was freely exposed except to permit cutting. A person trying to cut hair or shave with the subject razor would be cut by the freely exposed blade. The altered razor with its open blade was definitely a weapon in jail.

An altered disposable razor was contraband, and inmates knew not to alter a disposable razor. Inmates were advised of the prohibition during booking as well as by

rules posted in the housing area. An intact Bic disposable razor with the bottom blade guard in place could not be used as a weapon. A shank was a weapon made in jail from an altered object and was used for cutting or slicing. According to Hong, the "razor blade" in the present case was a shank.

Gonzales's testimony corroborated Hong's testimony. Moreover, according to Gonzales, no inmate would possess the subject razor except for the purpose of using it as a weapon. It appeared to Gonzales that someone had snapped off the bottom plastic guard from the subject razor. Appellant presented no defense evidence.

CONTENTION

Appellant claims the trial court erroneously failed to instruct adequately on the elements of the present offense.

DISCUSSION

The Trial Court Did Not Prejudicially Err by Giving the Modified CALJIC No. 7.38.

1. *Pertinent Facts.*

During discussions concerning proposed jury instructions, the court indicated it would give the jury a modified CALJIC No. 7.38. CALJIC No. 7.38 instructs on the elements of the present offense.

Appellant indicated he wanted the court to revise the instruction by adding the following portion of CALCRIM No. 2745: "[You may consider evidence that the object could be used in a harmless way in deciding if the object is (a/an) _____ <*insert type of weapon from Pen. Code, § 4502*>, as defined here.]"[1] Appellant indicated concern that a Bic razor, which could be innocently used, could also be viewed as a weapon. The prosecutor objected to the revision.

---

[1] Although appellant initially indicated he wanted the court to give CALCRIM No. 2745, instead of CALJIC No. 7.38, he did not, during later discussions, dispute the court's characterization of his request as calling for the revising of CALJIC No. 7.38, as indicated above.

The court refused to revise CALJIC No. 7.38 as requested by appellant. The court indicated the instruction would refer to "a razor blade, *altered* razor, or shank[.]" (Italics added.) Appellant then objected to the disjunctive phrasing. Appellant's counsel indicated he was concerned with the phrase "razor blade." Appellant's counsel argued that possessing a Bic razor blade in jail was legal; therefore, he preferred that the instruction refer only to an altered razor blade and shank. The court commented that, although jail personnel did not give appellant a "razor blade," appellant nonetheless possessed a "razor blade."[2] The court also indicated that "what we are [really] talking about" is an "altered razor," and an "altered razor" was known as a "shank." The court further indicated it would omit any conjunctive or disjunctive wording as to the language at issue and, instead, would use slash marks, resulting in the designation "razor blade/altered razor/shank." The court explained "[i]t's really one item here."

The court later gave a modified written CALJIC No. 7.38 to the jury,[3] and, as indicated, the modified written instruction twice referred to "a razor blade/altered

---

[2] The court's comment suggests it meant that even though appellant was not given a razor blade separately, he nonetheless possessed one as part of the altered razor he possessed.

[3] The modified CALJIC No. 7.38 written instruction stated, "Defendant is accused in Count one of having violated § 4502, subdivision (a) of the Penal Code, a crime. [¶] Every person who, while at or confined in any penal institution or while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his person or has under his custody or control any instrument or weapon commonly known as a RAZOR BLADE/ALTERED RAZOR/SHANK, is guilty of a violation of Penal Code § 4502, subdivision (a), a crime. [¶] 'Penal institution' means the state prison, a prison road camp, a prison forestry camp, or other prison camp or farm or a county jail or county road camp." The instruction then stated, "In order to prove this crime, each of the following elements must be proved: [¶] 1. A person was at or confined in, or being conveyed to or from, any penal institution, or under the custody of officials, officers, or employees of a penal institution; and [¶] 2. While being at, so confined, being conveyed, or under that custody, possessed or carried upon his person or under his custody an instrument or weapon commonly known as a RAZOR BLADE/ALTERED

razor/shank[.]" (Capitalization omitted.) The modified oral instruction given by the court was, in relevant part, essentially the same as the modified written instruction, except that (1) the oral instruction twice referred to "a razor blade, altered razor, *or* shank" (italics added) (as opposed to the designation "RAZOR BLADE/ALTERED RAZOR/SHANK" in the written instruction) and (2) the court orally told the jury, "That is the instruction concerning the crime. There are two elements to it." The court did not give CALCRIM No. 2745, or revise CALJIC No. 7.38, by the addition of the previously discussed language from CALCRIM No. 2745.

Appellant argued to the jury that, inter alia, the item he possessed was a "broken razor blade," the People presented no evidence on "how that razor became altered," and "the alteration to that razor [was] minor."

2. *Analysis.*

a. *The Court Did Not Erroneously Fail to Instruct on Whether the Razor Was Legitimate and Necessary for an Inmate.*

Appellant makes three claims of instructional error. His first claim is that the modified CALJIC No. 7.38, failed to instruct that (1) a "razor blade" and a "razor" were distinct,[4] and (2) the jury could "consider whether the razor was a legitimate and

---

RAZOR/SHANK. [¶] Penal institution includes a county jail facility. A shank is a pointed or sharpened device capable of cutting or stabbing."

[4] There is no dispute that a "razor blade" and an "altered razor" are each a "sharp instrument" within the meaning of Penal Code section 4502, subdivision (a). Generally speaking, Penal Code section 4502, subdivision (a), proscribes, in relevant part, custodial possession of a "sharp instrument." The subdivision states, in relevant part, that "(a) Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his or her person or has under his or her custody or control any instrument or weapon of the kind commonly known as a . . . sharp instrument, . . . is guilty of a felony[.]" The information in the present case alleged, in relevant part, that "the crime of custodial possession of weapon, in violation of Penal Code section 4502(a), . . . was committed by [appellant], who did . . . possess and carry upon the person RAZOR BLADE." (Some capitalization omitted.)

necessary possession for an inmate." Appellant suggests that, although an inmate's possession of a razor blade by itself might be a violation of Penal Code section 4502, subdivision (a), an inmate's possession of a razor might not be, and the instruction should have distinguished the two items and apprised the jury of this potentially exculpating issue.

We note that "[a]s a general rule, ordinary words do not require definition; they are presumed to be understood by the jurors. [Citations.]" (*People v. Jones* (1971) 19 Cal.App.3d 437, 447.) As mentioned, the modified written instruction referred to a "RAZOR BLADE/ALTERED RAZOR/SHANK," while the oral instruction referred to these items expressly in the disjunctive. A "razor" is "a keen-edged cutting instrument for shaving or cutting hair." (Merriam-Webster's Collegiate Dict. (10th ed. 1995) p. 971.) A "blade" is the "cutting part of an implement." (Merriam-Webster's Collegiate Dict., *supra*, p. 120.) A "razor blade" is therefore the cutting part of a "razor." Accordingly, we reject appellant's argument that the terms "razor blade" and "razor" were not distinct. The terms were distinguishable by their ordinary meaning.

Appellant's real argument appears to be that the modified instruction failed to instruct the jury that they could consider whether the "razor" was a "legitimate and necessary possession for an inmate." Appellant cites *People v. Custodio* (1999) 73 Cal.App.4th 807, which concluded Penal Code section 4502, subdivision (a), does not apply to an item "which ordinarily is used for a legitimate and necessary purpose--unless the inmate uses the [item] as a weapon. [Citation.]" (*People v. Custodio*, *supra*, at p. 812.)

We reject the argument. First, the language of a statute defining a crime is generally an appropriate and desirable basis for an instruction. (Cf. *People v. Cantrell* (1992) 7 Cal.App.4th 523, 543; *People v. Jones*, *supra*, 19 Cal.App.3d 437, 447.) A comparison of the pertinent language of Penal Code section 4502, subdivision (a) (see fn. 4, *ante*), with the pertinent language of the modified CALJIC No. 7.38 (see fn. 3, *ante*), reveals that the latter language essentially tracked the statutory language. The only

pertinent difference is that the modified instruction, instead of using the statutory phrase "sharp instrument," used the designation "a razor blade/altered razor/shank[.]" (Capitalization omitted.) However, there is no dispute that each of these three items is a "sharp instrument." The modified CALJIC No. 7.38, using the statutory language, adequately instructed the jury, and there was no need for the court to instruct the jury that they could consider whether the razor was a legitimate and necessary possession for an inmate.

Second, there was no substantial evidence that the razor which appellant possessed was a legitimate and necessary possession for an inmate. The trial court was not obligated to instruct the jury that they could consider whether the razor was such a possession because there was no substantial evidence to support the giving of such an instruction. (Cf. *People v. Tufunga* (1999) 21 Cal.4th 935, 944; *People v. Flannel* (1979) 25 Cal.3d 668, 684.)

Finally, in light of our prejudice analysis below, the alleged instructional error was not prejudicial under any conceivable standard because there was overwhelming evidence, based on the deputies' testimony, that the altered razor which appellant possessed was contraband. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

b. *The Court Did Not Erroneously Refuse to Instruct on Whether the Razor Was Harmless.*

Appellant's second claim is that the trial court erroneously refused to give the previously quoted portion of CALCRIM No. 2745. We reject the claim. As indicated, the modified CALJIC No. 7.38, in pertinent part, essentially tracked the statutory language, which was an adequate basis for instruction on the elements of the crime. (Cf. *People v. Cantrell*, *supra*, 7 Cal.App.4th at p. 543.) Moreover, there was no substantial evidence that the razor which appellant possessed could be used in a harmless way; therefore, the trial court did not err by refusing to give the previously quoted portion of CALCRIM No. 2745. (Cf. *People v. Tufunga*, *supra*, 21 Cal.4th at p.944.)

Finally, in light of our prejudice analysis below, the alleged instructional error was not prejudicial under any conceivable standard because there was overwhelming evidence, based on the deputies' testimony, that the razor which appellant possessed could be used only in a harmful way. (Cf. *People v. Watson, supra,* 46 Cal.2d at p. 836; *Chapman v. California, supra,* 386 U.S. at p. 24.)

c. *The Court Did Not Prejudicially Err by Refusing to Instruct on Knowledge Requirements.*

Appellant claims that the modified CALJIC No. 7.38 erroneously failed to instruct that the jury had to find that "appellant knew that he possessed the razor and knew that the broken razor was a prohibited sharp instrument that could be used as a weapon."

(1) *We Assume the Court Erred By Failing to Instruct on the Knowing Possession Requirement.*

We assume without deciding that the trial court erred by failing to instruct that appellant had to knowingly possess the item which was a razor (even if appellant did not know the nature of the object, i.e., did not know the object was a razor). (See *People v. Strunk* (1995) 31 Cal.App.4th 265, 272; *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779.) However, as discussed below, it does not follow that reversal of the judgment is warranted.

(2) *The Court Did Not Err By Failing to Instruct on Appellant's Knowledge that He Possessed a Prohibited Sharp Instrument Which Could Be Used As a Weapon.*

Appellant also argues the trial court erred by failing to instruct the jury that appellant had to know that the broken razor (altered razor) (1) was a sharp instrument, (2) was prohibited, and (3) could be used as a weapon.[5] We disagree. This is not a narcotics case in which a defendant possessed a substance (e.g., a powder) which was not readily identifiable as narcotics and which, therefore, based on the appearance of the

[5] There is no dispute the "broken razor" was a "sharp instrument" within the meaning of Penal Code section 4502, subdivision (a).

substance, could have been narcotics or an innocuous substance. In such a case, a knowledge requirement as to the nature of the substance is appropriate. Nor is this a case such as *People v. Rubalcava* (2000) 23 Cal.4th 322, cited by appellant, in which Penal Code section 12020, subdivision (a), by proscribing possession of a dirk or dagger, "criminalizes ' "traditionally lawful conduct," ' " (*People v. Rubalcava, supra*, at p. 331) with the result that a knowledge requirement as to the nature of the object as a dirk or dagger is appropriate.

There is no dispute appellant possessed a broken razor, i.e., a razor altered by the elimination of its bottom plastic blade guard. Nothing in the People's evidence indicated appellant ever had possessed the razor in an unaltered state. The item was clearly an altered razor. Gonzales testified it appeared that someone had snapped off the bottom plastic guard from the razor. Nothing in the People's evidence suggested the altered razor could have been confused for an unaltered razor. Appellant conceded during jury argument that he possessed an altered razor. There is no dispute appellant's altered razor was a "sharp instrument" within the meaning of Penal Code section 4502, subdivision (a). Nothing in the People's evidence suggested the altered razor could be confused for an instrument which was not sharp. Appellant was placed on notice while in confinement that he could not have an altered razor.

Moreover, according to the evidence, the altered razor was a weapon designed for use to cut someone. Nothing in the People's evidence suggested the altered razor could be used for any other purpose. The trial court was therefore not required to instruct that appellant had to know that the broken razor was a "sharp instrument" or could be used as a weapon.

Further, appellant's ignorance of the law, i.e., that possession of the broken razor was unlawful, was no excuse in the present case. Whether appellant knew that possession of the broken razor was unlawful was irrelevant. (Cf. *People v. Reynolds, supra*, 205 Cal.App.3d at p. 779; see *People v. Gory* (1946) 28 Cal.2d 450, 455-456.)

The trial court was therefore not required to instruct that appellant had to know that the broken razor was a prohibited sharp instrument which could be used as a weapon.

(3) *No Prejudicial Instructional Error Occurred.*

Finally, even if the trial court erred by failing to instruct that appellant (1) had to knowingly possess an object which was a razor, and (2) had to know that the broken razor was a prohibited sharp instrument which could be used as a weapon, it does not follow that reversal of the judgment is warranted. The altered razor was found in appellant's property bag which only he had been carrying. Nothing in the People's evidence indicated the altered razor was placed in the bag without appellant's knowledge or that he inadvertently possessed the altered razor. The fact that appellant possessed the altered razor provided substantial evidence of his knowing possession and his knowledge as to the nature of the item possessed, i.e., his knowledge that the item which he possessed was an altered razor. (Cf. *People v. White* (1969) 71 Cal.2d 80, 83; *People v. Eckstrom* (1986) 187 Cal.App.3d 323, 331.)

Moreover, we already have cited various facts in support of our conclusion that the trial court was not required to instruct that appellant had to know that the broken razor was a "sharp instrument" or could be used as a weapon. Further, and notwithstanding appellant's suggestion to the contrary, nothing in the People's evidence indicated the blade guard had been innocently broken. Again, Gonzales testified it appeared that someone had snapped off the blade guard. As mentioned, appellant was placed on notice while in confinement that he could not have an altered razor.

We conclude there was overwhelming evidence based on the deputies' testimony that appellant knew he possessed the altered razor and knew it was a sharp instrument which could only be used as a weapon. Accordingly, any trial court error in failing to instruct that appellant had to knowingly possess an object which was a razor, and had to know that the broken razor was a prohibited sharp instrument which could be used as a weapon, was harmless under any conceivable standard. (Cf. *People v. Watson, supra,* 46 Cal.2d at p. 836; *Chapman v. California, supra,* 386 U.S. at p. 24.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.